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Order to Show Cause

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 ETALON IMOB S.R.L. ET AL.,

4 Defendants,

5 v.

12 CV 6868 (BSJ)

6 SCHOENBACH, ET AL.,

7 Defendants.

8-----x  
9 New York, N.Y.  
10 September 19, 2012  
11 3:10 p.m.

12 Before:

13 HON. BARBARA S. JONES,

14 District Judge

15 APPEARANCES

16 VANDENBERG & FELIU, LLP  
17 Attorneys for Plaintiffs  
18 BY: JEFFREY E. GROSS KATHLEEN GARDNER

19 NATHANIEL B. SMITH  
20 Attorney for Defendants

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1 (Case called)

2 MR. GROSS: Jeffery Gross, for the plaintiffs.

3 MR. VANDENBERG: Raymond L. Vandenberg, for the  
4 plaintiffs.

5 MS. GARDNER: Kathleen Gardner, for the plaintiffs.

6 MR. SMITH: Nathaniel Smith, for the defendants.

7 THE COURT: All right. We're here on an order to show  
8 cause for an attachment and I have heard nothing from the  
9 defendants, obviously, so why don't you start.

10 MR. SMITH: I have an application, your Honor.

11 Yesterday I spoke with opposing counsel. What I want is two  
12 weeks in which to put in opposition papers to the motion and I  
13 am thinking, frankly, since many of the complaints are many of  
14 the causes of action -- that perhaps that motion should address  
15 that as well. But I recognize that the plaintiff believes that  
16 there's hundreds of thousands of dollars in New York in  
17 Mr. Schoenbach's escrow account.

18 Incidentally, as your Honor may know, Mr. Schoenbach  
19 would be here but he is in, I believe in Ecuador right now on a  
20 CJA related case.

21 THE COURT: Yes, I am aware of that.

22 MR. SMITH: I just wanted to say that because it's not  
23 like he is ducking and hiding. We're colleagues.

24 THE COURT: Yes.

25 MR. SMITH: Anyway, so, I've provided to opposing

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1 counsel a declaration by Mr. Schoenbach and I'll post it on ECF  
2 when I have a chance. Basically, what I've done is gone  
3 through, Mr. Schoenbach and I have gone through his escrow  
4 account and accounted for all of the money that came into his  
5 escrow account and related to this transaction in 2011 and all  
6 the monies that came in and out in 2012. And the bottom line  
7 is -- I could handle up an affidavit of Mr. Schoenbach. Be  
8 happen fee do that. The bottom line is that net net  
9 Mr. Schoenbach has \$45 remaining in his escrow accounts today  
10 that relates to this transaction. In fact, he has made \$900  
11 total in his escrow account for all of his client funds.

12 And I bring that up now because important that the  
13 Court know that my request for an adjournment is not going to  
14 really unduly prejudice the plaintiff's here. If there was  
15 some boat in a dock and it was about to set sail for the far  
16 seas, maybe two weeks would be unreasonable. But there's no  
17 real he is assets here except for the \$45 to attach. And so  
18 that's why I am requesting the time to put in more formal and  
19 more complete papers on why the motion should not be granted  
20 and I've also attached Mr. Schoenbach's bank statements from  
21 his escrow account to the affidavit.

22 THE COURT: All right. I'll hear from plaintiff.

23 MR. GROSS: Sure. Your Honor, having received this  
24 declaration there's a number of things that it does not  
25 address, a number of problems that it raises. First of all,

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1 this is a motion that is directed towards all three, actually,  
2 all four or five defendants here, Ricardo Leon, the principal,  
3 two companies that he controls.

4 THE COURT: Am I right that except for Mr. Schoenbach  
5 the rest of the defendants reside in Florida if reside is the  
6 right word?

7 MR. GROSS: Yes.

8 MR. SMITH: Or Switzerland.

9 MR. GROSS: Yes. So that is why under the CPLR there  
10 are foreign defendants who have assets and we have not heard  
11 either from counsel now or in his declaration, anything about  
12 the assets of those other defendants. We've put in our papers,  
13 we attached purported bank documents from Wachovia bank that  
14 was involved that may well be located in New York. And we  
15 certainly haven't heard any representation on behalf of these  
16 other defendants saying anything about the assets that they  
17 have in New York or otherwise.

18 So we, certainly, have a cause for concern that  
19 outside of Mr. Schoenbach the other defendants should be at a  
20 minimum even if Mr. Schoenbach wants some additional time to  
21 put in some more formal papers, at least pending those papers  
22 coming in in a resolution it seems appropriate that those other  
23 defendants should be temporarily pending, you know those papers  
24 coming in, being restrained from transferring or dissipating  
25 any assets they do have in New York cause the papers that we

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1 just saw and will soon be filed on ECF raise some very serious  
2 questions. Because as we submitted in our papers \$100,000 was  
3 submitted into Mr. Schoenbach's escrow account and under that  
4 the contract which is Exhibit C to both our complaint and the  
5 or order to show cause affidavits it should be issued only for  
6 the purpose of paying fees relating to a \$25 million standby  
7 letter of credit.

8 THE COURT: What was the date of that hundred thousand  
9 dollars --

10 MR. GROSS: The contract was signed in April 5, 2012  
11 and the money went in thereabouts in early April or late March  
12 2012.

13 THE COURT: All right.

14 MR. GROSS: And under the contract not only is it to  
15 be earmarked for that purpose but the contract provides that  
16 any payment or transfers to that money, the documentation of  
17 which is supposed to be immediately provided to my clients.  
18 And what we received just now attached to this declaration is  
19 that rather than some notation that explains why this money was  
20 dissipated, bank records that show that it was dissipated in a  
21 series of transfers ranging from five thousand, ten thousand,  
22 15 thousand with no explanation other than per instructions of  
23 R. Leon.

24 So this is very troubling that here the escrow agent  
25 who is holding money on behalf my client with very specific

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1 instructions, instructions to explain what is happening to this  
2 money just simply, according to the attorney's own bank  
3 records, just transferred it without providing explanation to  
4 the client as per the instructions of Mr. Leon. And they say  
5 these transfers took place from, I believe April to June of  
6 2012 in several different tranches. So it is very troubling  
7 that when somebody is subject to contractual fiduciary duties  
8 that this money was transferred it -- in that manner. And so  
9 for those reasons and given the absence of any compelling  
10 explanation even in the declaration, there is no explanation  
11 about why the money was transferred, whether my client was ever  
12 told what was the reason, who was the recipient. The bank  
13 records don't even say who the recipient was.

14 And so what we have is very a token amount of  
15 information. And we don't want there to be any delay. And I  
16 guess to that end I would raise one other point which is here  
17 we have an affidavit on behalf of Mr. Schoenbach. We've  
18 heard -- there is no declaration yet from the other client.  
19 There's no information about them. And to the extent that  
20 Mr. Schoenbach's -- if his bank documentation says he  
21 transferred money per the instructions of Mr. Leon, that raises  
22 an issue or a concern that, ultimately, Mr. Schoenbach's  
23 defense will be, I was following the instructions of my client,  
24 Mr. Leon. And if that's the case then that would seem that  
25 there is the potential for a conflict if one attorney is going

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1 to be representing all of these defendants.

2 And so I just raise that, obviously, it's for counsel  
3 to make the professional decision on his own but we don't want  
4 there to be any delay down the road should there suddenly be a  
5 decision that the opinions of Mr. Schoenbach and his clients  
6 become divergent. We wouldn't want there to be a delay down  
7 the road.

8 So for those reasons we respectfully request that to  
9 the extent that there's any brief adjournment of this hearing  
10 pending any further papers that, A, all the defendants be  
11 restrained from, all the defendants referring to Mr. Leon and  
12 Internations be restrained from transferring or dissipating any  
13 assets that they have in New York regardless of what financial  
14 institution or agent they're sitting in. But also that  
15 preliminarily be given the information that we've requested in  
16 our motion about the nature of their assets and what assets may  
17 be subject to attachment in New York pursuant to CPLR 6220,  
18 seems only fair that if the defense are asking for some more  
19 time they should use that time to provide us some of that  
20 meaningful information rather than just telling us the money  
21 when out and not telling us where it went and why

22 THE COURT: All right. Thank you.

23 Mr. Smith, the object here is since we're dealing with  
24 citizens outside of New York even though it's foreign, if you  
25 will, even though it's Florida. The issue here is what assets

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1 are there in New York that could satisfy a judgment in this  
2 case?

3 MR. SMITH: Your Honor, I'd be perfectly candid with  
4 you. I don't know the answer to that. The way I read this  
5 application was that it was a request for an order of  
6 attachment of, as I think all orders of attachment must be, of  
7 specific property within the jurisdiction of the Court. The  
8 only asset they identified was Mr. Schoenbach's escrow account  
9 which is where all this money came in and where it went out  
10 which cannot be a surprise to them.

11 But in any event, now they're asking basically for a  
12 different kind of relief. They're asking for an injunction  
13 restraining the transfer of any assets that are in the  
14 possession or control of any of the defendants in the state of  
15 New York anywhere. And that's slightly different, actually,  
16 very different relief. And I am not in a position getting  
17 retainer agreement two days ago, a client getting the papers  
18 five days ago. I am not in a position to say there are or  
19 there are not any assets. I mean Mr. Schoenbach works for  
20 Leon. That's one of his clients. So I mean he has the  
21 potential assets. Every time he bills that client on unrelated  
22 matters there is asset. So I would want to be very careful  
23 about making any kind of representation.

24 THE COURT: I'm not asking about Mr. Schoenbach. I'm  
25 asking about the others.

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1                   MR. SMITH: I understand. I just use that as an  
2 example because I am thinking about Mr. Schoenbach because I  
3 know, for example, he has done work for Mr. Leon on his  
4 companies on other matters and so there's potential dealings  
5 here in New York. There's potential other monies. The way I  
6 read this order of attachment was they're seeking specific  
7 order of attachment which is, basically, a direction by the  
8 Court to tell the sheriff to go pull out money from specific  
9 designated accounts. And so far as I can see, the accounts  
10 that they've designated are Mr. Schoenbach's escrow accounts.  
11 Now they're coming in and saying, well, there's a little bit  
12 more than that. But, frankly, their own papers layout the  
13 whole history of the case which is that in 2011 they hire  
14 Mr. Leon to grace -- they wired him \$150,000. So for 2011  
15 those monies went in and went out in 2011. And in their own  
16 papers they acknowledge that Mr. Leon according to them  
17 breached that obligation 19 months ago.

18                   The second piece of this is \$100,000 loan that was  
19 given to or by one of the defendants given to one of the  
20 plaintiffs, from one of the plaintiffs to one of the  
21 defendants, another \$1,000 to aid him in getting this  
22 transaction done. And according to their papers that  
23 obligation was breached four months ago.

24                   I am raising all of these points here, your Honor,  
25 because if they're seeking some sort of injunctive relief then

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1 latches is ringing loud and clear. According to their papers  
2 the defendant, the principle defendants, the out-of-state  
3 defendants breached their contractual obligations four months  
4 ago and 19 months ago and I think that they can't come into  
5 court and be making claims about immediate relief under those  
6 circumstances.

7 THE COURT: Excuse me a minute.

8 (Pause)

9 THE COURT: All right. I'll hear from you, Mr. Gross.

10 MR. SMITH: I just have one more point, your Honor.

11 Mr. Gross said something about oh, it's a terrible  
12 thing about Mr. Schoenbach disbursing funds in violation of the  
13 escrow agreement. That's just unfounded. The escrow agreement  
14 gives Mr. Schoenbach and attached to their papers paragraph  
15 four it says Lawrence H. Schoenbach, Esq. Law offices of  
16 Lawrence H. Schoenbach, acting as the attorney escrow agent for  
17 the transaction, shall only in accordance with the written  
18 instructions of in a holding, etc., distribute the funds  
19 pertaining to this escrow agreement.

20 They knew that Mr. Schoenbach was the escrow agent,  
21 was holding the funds and that he was going to be disbursing  
22 the funds pursuant to instructions from the other clients  
23 they're suing.

24 THE COURT: I am not here to decide on the merits of  
25 those actions right now. The question before me is whether or

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1 not plaintiffs have proven that they have a right to be  
2 concerned about being able to attach enough assets to pay the  
3 debt should one occur in the judgment when this lawsuit is  
4 finally decided and that's all I am here for. And you don't  
5 know what assets your clients have in New York, correct?

6 MR. SMITH: Well, I mean I know what you have -- you  
7 are talking about the foreign defendants? Yes.

8 THE COURT: Yes.

9 MR. SMITH: I do not know -- undertaken to do that kind  
10 of analysis but I will respectfully submit, your Honor, that  
11 the burden was on them to identify the assets unless they want  
12 to get an injunction they have to make a completely different  
13 analysis. You are entitled to under the CPLR to get an order  
14 of attachment if the Court thinks it's a good idea and if you  
15 can show that one of the defendants is a foreign defendant and  
16 if you have a valid cause of action. Well, that's a completely  
17 different standard from getting an injunction which requires  
18 irreparable injury. This is a breach of contract case. It  
19 requires that you move promptly. They didn't. They sat on  
20 their rights for nine or 14 months.

21 So I think that, respectfully, it's a different  
22 question. I think the question here is they came into court  
23 saying we want this money that's in Schoenbach's account. I've  
24 shown it doesn't exist except for \$45 and I need two weeks to  
25 marshal some facts, to respond to their allegations and the

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1 Court's question. I don't know what else to say.

2 THE COURT: All right.

3 MR. GROSS: Your Honor, I'd like to briefly address --  
4 I mean, we've heard counsel talk about notions of irreparable  
5 harm.

6 THE COURT: No. No.

7 MR. GROSS: Secondly, I'd like to point out that under  
8 the New York attachment procedures, one of the reasons why  
9 provision 6220 is out there for disclosure is when you know  
10 that somebody has some property in New York but you don't know  
11 everything about it but it is a remedy to be able to give you  
12 right away at the early stage of an attachment disclosure by  
13 any person of information regarding any property in which the  
14 defendant has an interest or any debts owing to the defendant.

15 So the purpose of that is that as a plaintiff you  
16 don't have to be a omniscient to know I have exact information  
17 about what every asset is in there. You have enough to know  
18 that they have some assets and good faith basis to bring your  
19 motion. But you are entitled to disclosure under 6220 to help  
20 right away you get enough information to be able to attach all  
21 of the appropriate sources in New York.

22 THE COURT: All right. Mr. Smith, or I guess I should  
23 really be talking to Mr. Gross. You want me to restrain the  
24 defendants from transferring any assets, correct?

25 MR. GROSS: Yes.

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1                   THE COURT: Essentially that is the injunction you are  
2 asking for, if you want to you call it an injunction.

3                   MR. GROSS: Right. I'm not going so far as to ask for  
4 Mr. Schoenbach to have to -- he has to restrain personal assets  
5 cause he is a New York resident. But with respect to the other  
6 defendants, yes.

7                   THE COURT: Only the others, yes. That's what I was  
8 talking about. And then you want to proceed and get disclosure  
9 of the assets for the foreign defendants, correct?

10                  MR. GROSS: Correct.

11                  THE COURT: All right. And I gather you are not  
12 agreeing to Mr. Gross' proposal of two weeks so that he can  
13 submit some paper, correct?

14                  MR. GROSS: That's correct, your Honor.

15                  THE COURT: All right. Do you have a proposed order  
16 for me?

17                  MR. GROSS: No. I'd be willing to get you one later  
18 this afternoon but, no, I do not have one.

19                  THE COURT: All right. I am inclined -- I am not  
20 ruling at this moment. I am inclined to grant a motion to  
21 restrain the foreign defendants from transferring any assets  
22 out of New York and I'd like a proposed order which would cover  
23 that as well as the other provision for disclosure. I am still  
24 going to take it under consideration.

25                  And look, Mr. Gross, I am sympathetic that you've only

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1 just been retained in this case but as I said before, the focus  
2 here is really all about assets, whether or not the claims look  
3 like it's meritorious. All I can do for that at the moment is  
4 read the complaint.

5 Has the plaintiff shown that they have a right to be  
6 concerned about not being able to recoup their debt here if  
7 there's a judgment?

8 Your focus -- and I'd like you to respond to this as  
9 quickly as possible -- should be one that tells me that while I  
10 suppose you may want to attack the -- of the complaint, that's  
11 fine. But the bottom line is I don't expect an extensive  
12 motion to dismiss by any means. But what you really should be  
13 telling us here is that there is no reason not to think your  
14 clients aren't going to have the assets which can be obtained  
15 here in New York. That's the focal point. That's why when you  
16 have foreign citizens or domiciliaries you look for what assets  
17 they have in New York. So with that as a focus I think you  
18 should be preparing a response.

19 In the interim, however, I am inclined to grant  
20 restraining order which would prevent your foreign clients from  
21 transferring any assets out of New York. And I've also  
22 considered in ordering that you provide the information, get  
23 the information from your clients and they provide the  
24 information as to where their assets are here in New York.

25 MR. SMITH: Your Honor, may I make a suggestion

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1 that --

2 THE COURT: Sure.

3 MR. SMITH: -- which is give me a chance, a few days  
4 to find out whether or not -- I mean my supposition but it's  
5 mere supposition -- is that these foreign defendants don't have  
6 any assets other than what Schoenbach was holding in his escrow  
7 account.

8 THE COURT: Well, you know what? This may well be  
9 true in which case their concerns are pretty sensible ones.  
10 But in the interim I would not want them moving them out of New  
11 York. Now, the question really is, have they shown me enough  
12 to be for cause of concern? Look, the complaint is what the  
13 complaint is and if they prevail and they'd be entitled to  
14 those monies and with the exception of Mr. Schoenbach whom I am  
15 sure or at least I assume is a New York domiciliary if he works  
16 here.

17 MR. SMITH: Garden City.

18 THE COURT: Yeah. He is going to be here and I would  
19 not -- I doubt I'd grant an attachment with him of his personal  
20 assets and nor is the plaintiff asking for those.

21 With respect to the escrow account, that may be a big  
22 issue as to whether those monies were monies that were expended  
23 without the client knowing exactly what they were being spent  
24 for. But that's not my issue at the moment. And the focus has  
25 to be on your four foreign clients and I've told you what my

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1 inclinations are. I am not ruling. I'd like to see a proposed  
2 order from the plaintiffs and I think the sooner you get some  
3 response into this the better.

4 How much time do you want? I mean it's quite possible  
5 you could persuade me to change course here and lift the  
6 restraints if that's indeed what I decide to do. But I haven't  
7 heard anything to give me any comfort.

8 MR. SMITH: Well, I mean, judge, respectfully, I  
9 disagree that the Court's review of the case is limited to  
10 reading just the allegations of the complaint. If they want to  
11 get any kind of restraining order, a temporary restraining  
12 order or in this case a preliminary injunction, there are  
13 standards that have to be met. They have to show clear right  
14 to relief. The way I read this complaint is it's, basically, a  
15 breach of contract case that's dressed up as a fraud. And they  
16 attach an escrow agreement which gives the escrow agent the  
17 right to transfer the funds. So I think the whole case just  
18 falls apart. And I think that's relevant to an analysis about  
19 whether or not the Court should grant injunctive relief because  
20 likelihood of success on the merits is one of the key factors  
21 here. They haven't shown any reason to think that the  
22 defendants who are foreign have done anything to secret assets,  
23 which is a separate way of getting an order of attachment.

24 THE COURT: Yes, it is.

25 MR. SMITH: They're trying to sort of like blend like

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1 three different provisions of the CPLR to get what they want.

2 THE COURT: All right. This is fine. I need  
3 information from you.

4 MR. SMITH: I need time in which to get it. I mean  
5 I've got a Swiss resident and Schoenbach's in Ecuador. I am  
6 asking for two weeks here. They sat on their rights for over a  
7 year for one of these claims. I don't think I am being  
8 unreasonable in asking for two weeks. They haven't  
9 demonstrated any irreparable injury from two weeks for me to  
10 put in papers to respond to all these issues.

11 THE COURT: Well, you can have your two weeks and I'll  
12 consider the argument you've just made and I'll take a look at  
13 your proposed order and make the final ruling, okay.

14 MR. SMITH: All right. Okay. Thank you, your Honor.

15 THE COURT: You get it in sooner the better.

16 (Adjourned)

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